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Supreme Court, U.S.
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No. 96-5955

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1995

STEINEY J. RICHARDS, PETITIONER

VS.

THE STATE OF WISCONSIN, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF WISCONSIN

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

THE BRIEF IN OPPOSITION MISSTATES THE ISSUES BEFORE THE COURT.

In the "Questions Presented" section of its brief, the respondent raises only questions never reached by the Wisconsin supreme court in this case. The petitioner in no way agrees that the scope of the granting of certiorari ought to be expanded in this case. The Wisconsin supreme court opinion relegated its comments on respondent's first two "Questions Presented," to a footnote explaining that in a blanket rule case, the question of "probable cause" vs. "reasonable suspicion" had no relevance. State v. Richards, 201 Wis. 2d 839, 849, 549 N.W.2d 218, 222 n. 6 (1996) ("This issue must be left to a case in which drugs are not involved.").

The respondent raises "useless gesture" as a defense in its third "Question Presented." Again, the Wisconsin supreme court did not reach consideration of this doctrine in this case, and the case was not decided on that basis. The main opinion refers repeatedly to the fact that the Wisconsin supreme court decided this case on the basis of the blanket rule, therefore the majority of the court did not reach the question as to whether some other exception to the announcement requirement should apply. 201 Wis. 2d at 844, 849, 860, 549 N.W.2d at 220, 222, 227. Although there is a brief discussion of "useless gesture" in a footnote in the concurring opinion, 201 Wis. 2d at 864, 549 N.W.2d at 228, n. 3,

this principle simply does not apply under these facts because there is ambiguity over whether the petitioner knew those seeking admission were police and why they were there. The police here used a ruse to get the petitioner to open the door to his room: the officer who knocked on the door was masquerading as a maintenance man. The petitioner may or may not have seen a uniformed officer standing off to the side of the "maintenance man." Paramount to this analysis is that: the petitioner had no indication from the police of their purpose in coming to his door at 3:40 a.m. Under Miller v. United States, 357 U.S. 301, 309-310 (1958), for "useless gesture" to lie, the officer must be virtually certain that the person inside is already aware of the presence and purpose of the police prior to entry:

> The rule seems to require notice in the form of an express announcement by the officers of their purpose for demanding admission. The burden of making an express announcement is certainly slight. A few more words by the officers would have satisfied the requirement in this case. It may be that, without an express announcement of purpose, the facts known to officers would justify them in being virtually certain that the petitioner already knows their purpose so that an announcement would be a useless gesture.

The respondent's fourth "Question Presented" is a thinly-disguised "independent source/inevitable-discovery" Trojan horse. First, such a question was not reached by the lower court. Secondly, no such doctrine should apply under the facts here. Thirdly, the Supreme Court already declined to consider this issue when a

lower court did not address it in Wilson v. Arkansas, 115 S. Ct. 1914, 1919, n. 4 (1995).

The opposing brief presents items which were not considered by the lower court in ruling. These are simply facts that would not be weighed unless the blanket rule were overcome. 201 Wis. 2d at 843, 549 N.W.2d at 220. ("The dispositive facts for purposes of this appeal can be stated succinctly.")

There is no misstatement of law or fact in the petition. The lower court opinion discusses warrants for felonious drug delivery. It is fine for misdemeanor drug possessors that they can rest assured of the right to have the police announce presence and purpose before entering the home. However, the Fourth Amendment should not be less in force merely because the police suspect a felony rather than a misdemeanor. Teenagers sharing a joint at a "pot" party may be engaging in felonious delivery under Wisconsin law, but, reprehensible as such conduct may be, do we really want the SWAT team busting in to stop it when a knock on the door by the local constable will probably suffice? Further, the difference between misdemeanor possession and felonious possession with intent to deliver could be that the possessor has his drugs in more than one bag. See e.g. Peasley v. State, 83 Wis. 2d 224, 231-32, 265 N.W.2d 506, 509-11 (1978) (No minimum quantity of substance is necessary to

sustain a conviction for possession of controlled substance; the fact that the defendant possessed 1/3 of a gram of cocaine in four packages is probative of intent to deliver ((a felony)); the state was not required to explain away at trial the possible inference that the small quantity was intended just for personal use rather than delivery).

It is thus a function of the complications of the law of intent that the distinction between felony and misdemeanor in drug cases is in the eye of the beholder (in this case, the officer executing the search warrant for drugs).

It may sound absurd and Kafka-esque to suggest that one could be killed in a raid of one's house for having an insignificant quantity of controlled substance, yet that is precisely what occurred in a "no-knock" raid that occurred in Beaver Dam, Wisconsin on April 17, 1995. See Wouk, Walter, "Shootings show pot laws deserve another look," Albany (N.Y.) Times Union, September 11, 1995, at A6; Imrie, Robert, "Slayings by cops soar in rural parts of state," Capital Times (Madison WI), February 15, 1996, at 6A. The raid occurred before Richards issued, but after the fixing of the blanket rule in State v. Stevens, 181 Wis. 2d 410, 511 N.W.2d 591 (1994).

The respondent maintains that the Supreme Court already denied certiorari in Stevens, supra. under

identical circumstances. No significance can be attached to the denial of a writ of certiorari other than the Court refused to take the case, see e.g. Brown v. Allen, 344 U.S. 443, 451-52 (1953).

In fact, the circumstances faced by Stevens and those now faced by Richards are not identical: the issues raised here revolve around the state court's interpretation of Wilson. The Wisconsin supreme court issued Stevens before Wilson came out. Further, Henry R. Schultz, the lawyer who sought certiorari for Bruce Stevens, told me that the petition was not perfunctorily denied: the petition for certiorari in Stevens was pending for a long time, and it was conferenced at least three times. The petition in Stevens contained the question of whether there was a constitutional basis for the rule of announcement. Faced with a choice between Stevens and Wilson for deciding this controversy, the Court may have had a cleaner case for determining the question in Wilson.

Lastly, while, as respondent contends, police may have the incentive to choose the method of entry safest for the police, the Fourth Amendment was not intended by the founders for the protection of government, but rather for protection of people against the excesses of government. Therefore, concerns for householder safety

should be foremost in considering the appropriateness of this case for certiorari.

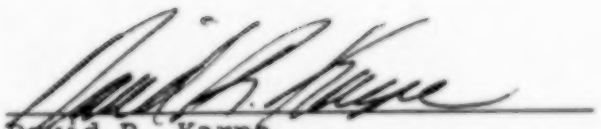
As Justice Scalia wrote in his concurring opinion in Minnesota v. Dickerson, 508 U.S. 366, 379 (1993),

> The purpose of the [Fourth Amendment's prohibition against unreasonable searches and seizures] is to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted -- even if a later, less virtuous age should become accustomed to considering all sorts of intrusions "reasonable."

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,



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November 20, 1996

Mr. William K. Suter
Clerk
Supreme Court of the United States of America
One First Street NE
Washington DC 20543

Re: Richards v. Wisconsin, 96-5955

Dear Mr. Suter:

Would you please find enclosed the original and ten copies of petitioner's Reply to Brief in Opposition to Petition for a Writ of Certiorari? As evidenced by the enclosed affidavit of service, a copy has been served today by mail on counsel for respondent.

Thank you very much for your attention.

Very truly yours,

David R. Karpe

cc Stephen W. Kleinmaier
Wisconsin Department of Justice
P.O. Box 7857
Madison WI 53707